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No. 254

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1947

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WILLIAM THOMAS KLOPP

Petitioner

v.

J. OVERLADE, WARDEN

Respondent

□

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit

HAYDEN C. COVINGTON

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Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit

TO THE SUPREME COURT OF THE UNITED STATES:

William Thomas Klopp petitions this Court for a writ of certiorari. He shows unto the Court as follows:

Summary of Matters Involved

Preliminary Statement

The decision of this Court in *Sunal* v. *Large* and *Alexander* v. *Kulick*, 67 S. Ct. 1588, does not foreclose the question presented here. The dictum of this Court's opinion in those cases supports the petition. In the *Sunal* and *Kulick* opinion the Court said that if they "had pursued the appellate course and failed, their cases would be quite different." (Page 7 of the slip opinion, 67 S. Ct. 1588, 1592)

In this case Klopp did pursue his appellate remedies through the court of appeals. Justifiable reasons exist for his failure to apply to this Court for a writ of certiorari. These will be discussed later.

Opinions of the Court Below

An opinion of the Seventh Circuit Court of Appeals, written when it decided the case, is not yet reported. [105-107][1] Also the court wrote an opinion upon the petition for rehearing, which is not yet reported. It appears as Appendix, pages 26-27. The original opinion and the opinion on petition for rehearing appear in the record.

Jurisdiction

Jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule 38 of the Revised Rules of the Supreme Court of the United States.

Timeliness of This Petition

The judgment of the court of appeals was rendered and entered December 27, 1946. [107] The judgment did not become final on such date because a petition for rehearing was filed. [111-118] The petition for rehearing was overruled on July 3, 1947. [118] The petition for writ of certiorari is filed within three months from that date.

Statutes and Regulations Involved

The Habeas Corpus Act is drawn in question. (28 U. S. C. §§ 451-464) The criminal sanctions clause of the Selective Training and Service Act of 1940 (Section 11) and the section of said Act exempting ministers of religion (Section 5 (d)) are also drawn in question. (50 U. S. C. App. §§ 301-318) Sections 622.44, 629.1, 629.35, 651.1-651.8, 653.1, 653.5 and 653.11 of the Selective Service Regulations (32 C. F. R. 622.44 *et seq.*) promulgated by the President under said Act are also involved.

[1] Bracketed figures appearing in this petition and the supporting brief refer to pages of printed transcript of record.

Constitutional Provisions Involved

Clause 2 in Section 9 of Article I, concerning the writ of habeas corpus. Clause 3 in Section 9 of Article I, prohibiting bills of attainder. Clauses 1 to 3 in Section 2 of Article III, investing the judicial powers. The provisions of the Fifth and Sixth Amendments relating to due process and the rights of defendants in criminal cases.

Questions Presented

ONE

Did the courts below err in holding that the writ of habeas corpus was not available to review the holdings of the trial and appellate courts that petitioner could not challenge the validity of the draft board order in defense to the indictment?

TWO

Did the sentencing court's refusal to permit petitioner, who had exhausted his administrative remedies, to show that the order supporting the indictment was void because he was exempt from all training and service as a minister of religion constitute denial of a judicial trial to petitioner contrary to the due-process and the bill-of-attainder clauses of the Constitution?

THREE

May petitioner by writ of habeas corpus collaterally attack the judgment sentencing him to prison based on a conviction under an indictment charging him with a violation of the Selective Training and Service Act by a failure to report as commanded, on the ground that the district court denied him the right to show the nullity of the order contrary to the due-process and the bill-of-attainder clauses of the Constitution?

FOUR

Did the reversal by this Court in *Dodez* v. *United States*, 67 S. Ct. 301, of the holdings of the lower courts that no defense was available in a case of this kind which caused the affirmance of petitioner's judgment of conviction, constitute extraordinary circumstances warranting the use of the writ of habeas corpus?

Statement of Case

FORM AND HISTORY OF ACTION

This civil action was begun by filing a petition for writ of habeas corpus in the name of the United States of America upon the relation of petitioner. It was alleged that the petitioner was illegally restrained of his liberty under a judgment and commitment of the United States District Court for the Southern District of Indiana based upon an indictment charging petitioner with an alleged violation of the Selective Training and Service Act of 1940, as amended, by refusal to submit to induction into the armed forces after reporting at the induction station pursuant to the order of the Selective Service board. [6-8]

Petitioner challenged the order of the draft board supporting the indictment on the grounds that it was made without basis in fact, contrary to the undisputed evidence, and contrary to the due process clause of the Fifth Amendment to the Constitution. He contended that the indictment and the judgment of conviction were illegal because the draft board order was illegal. [8-23] As a further ground for discharge upon the writ of habeas corpus he contended that upon trial of the indictment before a jury in the district court he was denied his constitutional right of a fair trial and the right to be heard in his defenses contrary to the due process clause of the Fifth Amendment to the Constitution. The trial judge denied him the right to introduce evidence challenging the validity of the order to

report upon the grounds heretofore stated. The court also charged the jury that it could not consider the invalidity of the order to report and limited the sole question to be determined by the jury to whether or not petitioner knowingly refused to report as directed by the local board and forbade the jury to determine whether or not he was exempt from duty.

It was further contended that, by reason of this action of the court trying the indictment under the Selective Training and Service Act, the said Act was, by the trial judge's misconduct, converted into a bill of attainder, contrary to Clause 3 of Section 9 of Article I of the Constitution; and that as construed and applied the Act and Regulations penalize him by denying his defenses for failure to report for assignment, and that such illegally transfer the judicial power of the courts to the draft boards, contrary to Article III of the Constitution, deny him his right of trial by jury contrary to the Sixth Amendment, deny him his right to a judicial trial and his liberty and rights contrary to the due process clause of the Fifth Amendment. [18-30]

The district court issued a show cause order. [32] In response thereto the respondent filed an answer and return. [38-52] Upon a hearing of the show cause order, it was stipulated between the parties that the case could be considered by the court below as though the writ of habeas corpus had issued instead of a show cause order. [53-55] Evidence was received. [93-101] The case was argued and briefs submitted. [56-58] The cause was submitted, decision was reserved and the case taken under advisement. [53-58, 100] A decision discharging the writ of habeas corpus and remanding petitioner to the custody of respondent was rendered and filed. [64-74] An order thereon dismissing the writ and remanding petitioner was entered. [73-74] Application was made to have petitioner admitted to bail pending disposition of this appeal. [76] Bail was allowed because of substantial questions that

should be decided by this court upon appeal. [76-77] Findings of fact and conclusions of law were entered. [58-64] Notice of appeal and bond were duly filed. [75, 78]

The case was duly considered by the court of appeals and judgment rendered affirming the order, dismissing the writ and remanding the petitioner to custody. [107] A petition for rehearing, duly filed, was denied. [111-118]

FACTS PROVED

Upon the hearing of the petition for writ of habeas corpus in the district court below, no testimony was received. The facts were undisputed, being established by documentary evidence. The parties stipulated to the facts, incorporating therein certain exhibits. [53-55, 95-98][2]

The facts have been fairly well covered by the district court below in the memorandum opinion. [58-73] For the purposes of consideration of the questions presented upon this petition, the facts found by the district court below may be accepted as true. Reference is here made to that opinion for succinct statement of the material facts. [58-73]

Petitioner was charged by indictment in the United States District Court for the Southern District of Ohio with an alleged violation of the Selective Training and Service Act of 1940. It was alleged that he violated the Act by failing to report for work of national importance. (2)[3]

[2] The exhibits were the papers filed in the Sixth Circuit Court of Appeals on an appeal from the judgment of conviction rendered against petitioner in the United States District Court for the Southern District of Ohio on May 15, 1944, as well as petitioner's draft board file produced by Local Board No. 4 for Butler County, Ohio.

[3] All figures appearing in *parentheses* ( ) refer to pages of the transcript of the trial of petitioner in the United States District Court for the Southern District of Ohio on May 15, 1944. Printed transcript was filed in the Sixth Circuit Court of Appeals, being numbered 9803 on the docket of that court. The transcript was filed in the court below March 4, 1946. The printed transcript of the record of the criminal trial was received in evidence as a part of the stipulation of facts in the court below, being petitioner's Exhibit A.

By motion to quash, petitioner claimed that the administrative process had been sufficiently completed so as to permit him to challenge the legality of the classification and the order made by the draft boards. It will be noted that the motion to quash is not attacking matters of form but matters of substance, both jurisdictional and legal. (3) He contended that if the right to urge this defense was denied him, a construction would be placed upon the Act and Regulations which made them unconstitutional. (3-5) Petitioner alleged that they were void because (a) they constitute a bill of attainder, contrary to Clause 3 in Section 9 of Article I of the Constitution; (b) they surrender the judicial powers of the United States Courts in the trial of criminal cases to the draft boards, contrary to Article III of the Constitution; (c) they deny petitioner his right to have a judicial trial and the right to prove his innocence and also his right to be heard contrary to the Fifth Amendment to the Constitution; (d) they deny the right of a jury trial and the right of a jury to determine the guilt or innocence of petitioner, contrary to the Sixth Amendment to the Constitution; (e) they permit conviction without evidence or upon hearsay evidence and deny petitioner the right of counsel in his defense contrary to the Fifth and Sixth Amendment to the Constitution; and (f) they permit the draft boards to determine the guilt of petitioner who is exempt and could not be found guilty of violating a duty under the Act, and thereby the Act and Regulations are converted into an *ex post facto* law contrary to Clause 3 in Section 9 of Article I of the Constitution. (3-6) The motion was overruled, to which petitioner excepted. (7)

Upon petitioner's trial in the District Court for the Southern District of Ohio the Government offered, and there was received, in evidence, petitioner's registration card, (132) petitioner's Selective Service questionnaire, together with exhibits attached thereto showing his claim for exemption as a minister of religion, (133, 144, 145-184)

the order to report for work of national importance. (185) As and for his defense, petitioner offered to show that he was exempt as a minister of religion and for this petitioner offered into evidence the remainder of the entire draft board file. (29-38, 186-246) These exhibits were excluded on the grounds that the illegality of the administrative determination could not be questioned in defense to the indictment. (29-30) Exception was taken to the ruling of the court. (38, 39) Petitioner also offered to show prejudice on the part of the local board for the purpose of establishing that he was denied a full and fair hearing, contrary to the due process clause. (44-50) This evidence was excluded for the reason also that such defense was not available against the charge contained in the indictment, (44) to which petitioner excepted. (44, 50)

At the close of the case for the Government petitioner presented a motion to dismiss and a motion for directed verdict and judgment of acquittal. (29) These motions pointed out that the evidence was insufficient to constitute a crime, that petitioner was exempt under the law from service, that the draft boards had their jurisdiction, and that the order to report was invalid. (69-71) It is specifically pointed out in the motion for directed verdict that "the defendant is not guilty as charged in the indictment," and the undisputed facts revealed the utter absence of showing a duty for "assignment to work." (71) The motions were overruled by the court and a denial of the right to argue on the same; to which petitioner duly excepted.(29)

At the close of all the evidence petitioner presented a renewal of motion to dismiss and a renewal of motion for directed verdict and judgment of acquittal. By these motions it was stated that (a) the Government still fails to prove a cause of action against petitioner, (b) the undisputed evidence shows that petitioner is not guilty as charged in the indictment, (c) the draft boards were without jurisdiction in law to place petitioner in any other

than Class IV-D as a minister, (d) the order to report is void, (e) to exclude petitioner's proof of innocence and denial to be heard in his defense, and to transfer the judicial functions of the United States Courts to draft boards constitute a violation of Article III of, and the Fifth and Sixth Amendments to the Constitution, (f) the limitation of the action to one issue, as to whether or not he reported is equivalent to instructing the jury to return a verdict of guilty and is a denial of a fair trial contrary to Article III of, and the Fifth and Sixth Amendments to the Constitution, (g) the construction placed upon the law deprives petitioner of due process contrary to the Constitution, and (h) the construction given the law by the court makes of the Act and Regulations thereunder a bill of attainder—all contrary to Clause 3 of Section 9 of Article I of the Constitution. (72-75) The two latter motions were overruled, to which exception was duly made. (62)

Petitioner's requested special instructions numbers 1 to 4, stating the legal basis of criminal prosecution of violators of the Act in the district courts of the United States and the right of petitioner to be held in his own behalf were refused. (76-78) Special instructions Nos. 4-A to 4-F disclosing the legal basis of review in the court when petitioner had exhausted his administrative remedies after having been found acceptable by the Government, were refused. (78-81) Requested special instruction No. 5, which directed the jury to give due consideration to all the evidence, was refused. (81) Instructions Nos. 6 to 21 giving definition to exempted individuals under the Act and duly and regularly ordained ministers in particular were refused. (81-92) Petitioner's special instructions Nos. 22 to 24 quote opinion of November 2, 1942, of the Director of Selective Service and application of said opinion to Jehovah's witnesses, said instructions were refused. (92-98) Instructions 25 to 34 which outline the rules of classification particularly as applicable to regular and duly ordained

ministers of religion were refused. (98-102) Special instructions 35 to 40 outlining the rules whereby draft boards are governed were refused. (102-106)

Special instructions 42 to 46 give definition to "reasonable doubt", "burden of proof", and "presumption of innocence"; particularly should instructions 44 and 46 have been given under the circumstances, but all were refused. (107-108) Special instructions 47 to 52 outline duties of the local board. The said local board violated the last five instructions which should have gone to the jury on jurisdictional grounds, not on matters of classification. All instructions were refused. (108-110)

After the general charge to the jury petitioner renewed his request for his special instructions to the jury, but his request was overruled, to which an exception was granted. Also petitioner took exception to that portion of the general charge in which the court, in substance, stated that there is only one issue in the case, whether or not petitioner reported for work. (66)

After the jury returned a verdict of guilty, petitioner took an exception to same as being contrary to the evidence. (67) Before sentencing petitioner, the court was requested by petitioner's counsel to allow him time to file two motions; to this request the court responded, "No, the law obligates the court to impose sentence immediately." (67) The court imposed a sentence of five years and a fine of thirty-five hundred dollars, to which counsel took exception. (68) Petitioner duly appealed to the United States Circuit Court of Appeals for the Sixth Circuit, filing notice of appeal with grounds. (113) His assignments of error were duly filed. (123-131)

Upon appeal, the judgment of the convicting court was affirmed. [19-22, 54, 64] An opinion was duly filed by the Sixth Circuit Court of Appeals giving reasons for the affirmance of the judgment of conviction:

"Appellant reiterates arguments repeatedly rejected

in the United States Courts. This court has spoken often in the broad context. *Rase* v. *United States,* 129 F. (2d) 204; *Checinski* v. *United States,* 129 F. (2d) 461; *Benesch* v. *Underwood,* 132 F. (2d) 430; *Kramer* v. *United States,* . . . F. (2d) . . . , decided February 8, 1945. In our last mentioned opinion, we cited a leading case from each of the ten circuit courts of appeal.

"The appellant emphasizes that his case differs from that of any of his predecessors in defiance of orders to report for work of national importance under civilian direction, in that he was ordered to report for induction after the amendment by Congress of the Selective Training and Service Act on December 5, 1943 [50 U. S. C. A., App. 304 (a)]. We find no merit in the attempted differentiation, which was very recently rejected by the Circuit Court of Appeals for the Second Circuit in *United States* v. *Flakowicz,* [146] F. (2d) [874], decided February [January 22] 1945. We agree with that court that *Billings* v. *Truesdell,* 321 U.S. 542, affords no support to the argument there made and repeated here. *Falbo* v. *United States,* 320 U. S. 549, settles the law against the contention of the appellant, just as it did against Flakowicz. The Supreme Court there made it very plain that the defense that classification as a conscientious objector, rather than as a minister of religion, was erroneous will not stand up in a criminal prosecution for wilful disobedience to the order of a Local Board, functioning under the Selective Training and Service Act, to a registrant to report for work of national importance."[4]

It was stipulated in the court below that petitioner did not apply to the United States Supreme Court for a writ of certiorari. [54]

The draft board file, parts of which were received into evidence and parts of which were excluded in the criminal trial, was received into evidence in its entirety by the court

[4] This opinion was received in evidence in the court below, being petitioner's Exhibit B. See 148 F. 2d 659.

below. It establishes that petitioner was a regular and duly ordained minister of religion, serving a fixed congregation in the City of Middletown, Ohio. (197-205)

Petitioner duly registered under the Selective Training and Service Act of 1940, with Local Board 4 for Butler County at Middletown, Ohio, on October 16, 1940. (132) In his questionnaire, duly filed on June 12, 1941, he asserted that he was a minister of religion, and made claim for exemption in Class IV-D as a minister in accordance with the law. (133-139) On June 16, 1941, he was given the classification of III-A by his local board (140) and on November 15, 1943, he was placed in Class IV-E as a conscientious objector. (21-22)

On November 23, 1943, petitioner requested a personal appearance, which was held on November 29, 1943. In order that he might be in a position to appeal his classification in event of an adverse decision, petitioner took a stenographer along so he could present an accurate record to the board of appeal. His local board refused his taking a record of the hearing and his stenographer was not permitted to attend the hearing. (212-213) Nevertheless, at the hearing and on every occasion that he had opportunity, he protested any other classification than that of IV-D as a minister of religion. He claims that the secretary of the local board made notes of the hearing and that said notes which were subsequently presented to the board of appeal contained distorted and false statements to the great prejudice of petitioner. After he discovered the false information transmitted to the board of appeal, on February 21, 1944, petitioner vigorously protested the inaccurate and prejudicial report of the hearing on November 29, 1943. (231) In his protest of November 29, 1943, petitioner "respectfully requested that the local board set aside my classification and

reopen my case and transfer the file to some other local board as required by the regulations, which other local board is not prejudiced on the matter." (234) The local board failed to notify petitioner by DSS Form 57 as required by the regulations, but sent him a letter denying him a reclassification. (210)

On January 11, 1944, before petitioner had taken his final-type (preinduction) physical examination, the local board issued a Conscientious Objector's Report whereby petitioner was reported available for service. (218)

The Director of Selective Service, evidently relying upon the literal statement of the local board that petitioner was available for service, issued the Assignment to Work of National Importance on February 10, 1944, before petitioner was given his final-type (preinduction) physical examination. (227)

On February 17, 1944, petitioner took his final-type (preinduction) physical examination at the induction station in Cincinnati, Ohio, and he was found "physically fit, acceptable by Army for general military service." (231) It was on February 17, 1944, that he was for the first time, and finally, found to be physically and mentally acceptable for work in the civilian public service camp to which he had been assigned. (231)

On February 25, 1944, petitioner was sent Order to Report for Work of National Importance at Medaryville, Indiana, on March 9, 1944. (185) Petitioner, relying on his legal exemption as a minister of religion, and the invalidity of the Order to Report for Work of National Importance, did not report.

How Issues Raised

The issues were raised by the petition for writ of habeas corpus, the return of the warden and the order of the court below discharging the writ and remanding the petitioner to custody of respondent. In the petition for writ of habeas corpus, petitioner contended that upon the trial of the indictment before the jury in the District Court for the Southern District of Ohio, he was denied his constitutional right of a fair trial and the right to be heard in his defense, contrary to the Constitution. [6-30] It was contended that the convicting court denied him due process of law by holding that he was not entitled to challenge the validity of the order commanding him to report for work of national importance, and in refusing him the right to offer evidence to show the invalidity of the order. [19, 20] By reason of this action of the convicting court, it was claimed that he was penalized contrary to due process clause and being denied his defense to the indictment. [19, 20] It was contended that the court transferred the judicial power of the court to the draft board, denying him his right of trial by jury, refusing him the right to a judicial trial and abridging his liberty, contrary to the due process clause of the Fifth Amendment to the Constitution. [20] Moreover, it was alleged that the Act and Regulations had been transformed into a bill of attainder, contrary to Clause 3, Section 9 of Article I of the Constitution. [21]

The courts below held that the holding and action of

the convicting court was not grounds for discharge upon a petition for writ of habeas corpus. [62, 68] However, the district court below also held that the holding and action of the convicting court, even though it may be said to be a violation of the due process clause, was harmless error and not grounds for the discharge of petitioner because the draft boards were justified in placing petitioner in Class IV-E and denying his claim for exemption as a minister of religion. [64-68] The basis for this conclusion was that because petitioner devoted part of his time to the performance of secular work, he could not complain of the action of the draft board in rejecting his claim for exemption as a minister. [64-68] The district court below concluded that the action of the draft boards in denying petitioner the ministerial classification and in classifying him as liable for training and service was not a denial of due process of law and was not arbitrary or capricious. [64-72] The court of appeals and the district court below held that the action of the convicting court in rejecting the evidence and in charging the jury was not a denial of due process of law. [64-72] The courts below declared that the imprisonment of petitioner was lawful and that he was not entitled to a discharge from custody. [64, 72]

Specification of Errors

The court below erred in affirming the judgment dismissing the writ of habeas corpus and remanding petitioner to custody.

Reasons Relied on for Granting Writ

The holding of the court below that the judgment dismissing the writ of habeas corpus should be affirmed upon the authority of this Court's holding in *Sunal* v. *Large* and *Alexander* v. *Kulick,* (67 S. Ct. 1588) is in direct conflict with the dictum of that opinion which reads: "Of course, if Sunal and Kulick had pursued the appellate course and failed, their cases would be quite different. But since they chose not to pursue the remedy which they had, we do not think they should now be allowed to justify their failure by saying they deemed any appeal futile." (Page 7 of slip opinion; 67 S. Ct. 1588, 1592)

In this case petitioner did pursue the remedies which were open to him so far as a reasonable person could be expected to go under the circumstances. Since the appeal was futile and the doctrine relied upon making it futile was reversed by this Court in *Dodez* v. *United States* (67 S. Ct. 301) there is ground for distinguishing the holding of the Court in the *Sunal* and *Kulick* cases and invoking the dictum as authority for the proposition that the court below erred in affirming the judgment of the district court dismissing the writ of habeas corpus.

The holding of the court below that the writ of habeas corpus was not available to review the actions of the district court and the appellate court in denying petitioner his defense to the indictment is a decision upon an impor-

tant question of federal law which has not been, but should be, settled by this Court.

Moreover, the courts below have so far departed from the accepted and usual course of judicial procedure in habeas corpus cases as to call for an exercise of this Court's power of supervision.

In so far as this case may be held to be governed by the decision of this Court in the *Sunal* and *Kulick* cases, the decision is error because petitioner submits that the decision of this Court in the *Sunal* and *Kulick* cases was erroneous for each and every one of the reasons stated by Sunal and Kulick in their joint petition for rehearing which is filed simultaneously with this petition. Said petition for rehearing should be considered by the Court along with this petition for writ of certiorari, as in some features the three cases are similar.

Additional reasons will be discussed in the supporting brief which is here referred to and made a part of the reasons relied on by petitioner for granting the writ of certiorari in this case.

WHEREFORE your petitioner prays that this Court exercise its discretion by directing the issuance of a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit, directing such court to certify to this Court for review and determination on a day certain to be named

therein, a full and complete transcript of the record and all proceedings in the case as numbered and entitled on the docket of said court; and that the order of the Circuit Court of Appeals, affirming the judgment of the district court, be here set aside and held for naught; and that your petitioner be granted such other and further relief in the premises as to this Court may seem just and proper in the circumstances.

WILLIAM THOMAS KLOPP, *Petitioner*

By HAYDEN C. COVINGTON, *his Counsel*

SUPPORTING BRIEF

Preliminary

For a statement as to the opinions of the court below, the basis on which the jurisdiction of this Court is claimed, the questions presented, the history of the action, how the issues were raised, the evidence received and rejected and the error relied upon, reference is here made to the foregoing petition for writ of certiorari.

ARGUMENT

Extraordinary circumstances exist in this case warranting the use of the writ of habeas corpus to review the errors of the convicting court upon the criminal trial of petitioner and the court of appeals in affirming the judgment of conviction.

This Court clarified the law in its holding that a registrant classified as a conscientious objector who had been accepted upon the preinduction physical examination had exhausted his administrative remedies and could make his defense against the indictment that the induction order was invalid because of illegal actions of the draft board. *Dodez* v. *United States,* 67 S. Ct. 301. This was on December 23, 1946.

On March 26, 1945, the Sixth Circuit Court of Appeals held that petitioner, who had exhausted his administrative remedies and stood in the same shoes as did Dodez, could not challenge the validity of the order in defense against the indictment. *Klopp* v. *United States,* 148 F. 2d 659. See also *Gibson* v. *United States* (CCA-8) 149 F. 2d 751 and *Dodez* v. *United States* (CCA-6) 154 F. 2d 637.

This prevailing bad judicial climate under the Act and Regulations extended throughout the country at the time the conviction of petitioner was affirmed by the court of

appeals. See dissenting opinion of Mr. Justice Frankfurter in *Estep* v. *United States,* 327 U. S. 114, 139.

At the time petitioner had lost his appeal, the outlook for a favorable change of climate was very bad because of the stormy conditions that registrants under similar circumstances had found in this Court on application for writ of certiorari. This record gave petitioner good grounds to believe that a petition for writ of certiorari would avail him nothing as it had availed the others nothing in similar cases considered by this Court.

This Court had decided *Falbo* v. *United States,* 320 U. S. 549. On May 22, 1944, it had denied certiorari in *Grieme* v. *United States,* 320 U. S. 744, the facts of which case were very similar to the facts in this case.

When Klopp's petition for rehearing had been overruled by the circuit court of appeals on May 7, 1945, this Court had already denied two petitions for certiorari where registrants had exhausted their administrative remedies. In *Flakowicz* v. *United States,* the petition for writ of certiorari was denied April 30, 1945. 325 U. S. 851.[5]

Certiorari was also denied on April 30, 1945, in *Rinko* v. *United States,* 325 U. S. 851; rehearing denied on May 28, 1945, 325 U. S. 894. It is conceded that, in the *Rinko* case, petitioner had exhausted his administrative remedies.

The decision in *Estep* v. *United States* (327 U. S. 114) did not clear away the fog of misunderstanding that prevailed in cases where the registrant was classified as a conscientious objector, was accepted upon a preinduction physical examination and thereafter refused to report for work of national importance. See *Dodez* v. *United States,*

[5] In this case Flakowicz had exhausted his administrative remedies. There was no further examination required to be given him at the induction center which would result in his discharge because he had been accepted upon a preinduction physical examination within 90 days before he was ordered to report for induction. See United States v. Balogh (CCA-2) 160 F. 2d 999. But compare Sunal v. Large (note 4), page 3 of slip opinion, 67 S. Ct. 1588, 1590.

154 F. 2d 637, where the Sixth Circuit Court of Appeals said: "We believe the cases are identical since neither Falbo nor Dodez had exhausted his administrative remedies by reporting for induction. In the case at bar had draftee so reported and then refused to be inducted, the *Estep* and *Smith* decisions would have been controlling." The law was not clarified until the *Dodez* decision of the Sixth Circuit was reversed by this Court on December 23, 1946. *Dodez* v. *United States*, 67 S. Ct. 301.

All the judges of the inferior federal courts of the country believed, up until December 23, 1946, that one had not exhausted his administrative remedies until he had submitted to induction or to the jurisdiction of the civilian public service camp.

During the time in which petitioner Klopp had to apply to this Court for a writ of certiorari there was not the faintest hope that the petition might be granted. Indeed, petitioner had every reason to believe that if he had applied to this Court for certiorari he would have received the same treatment as others in the same situation who had had the door closed in their faces. Previously the Court had denied certiorari in *Flakowicz* v. *United States* (325 U. S. 851) and *Rinko* v. *United States* (325 U. S. 851, rehearing denied 325 U. S. 894), cases where the administrative remedies had been exhausted.

Even if petitioner would have been prescient (which he was not), and could have anticipated the decision of this Court in *Dodez* v. *United States* (67 S. Ct. 301), still he would not have been able to have profited by applying for certiorari because in all likelihood (based on the action of this Court in the *Flakowicz* and *Rinko* cases) this Court would have denied his petition for certiorari.

In this respect petitioner should be judged according to the condition of the climate at the time his case was finally decided by the court of appeals and not according to the good weather conditions that prevailed after the

fog was swept away in *Dodez* v. *United States* on December 23, 1946. 67 S. Ct. 301.

The climate was bad during the time in which petitioner had to apply for certiorari. It is the imposition of a penalty to say that he is not now entitled to the writ of habeas corpus because to have applied for a writ of certiorari would have been a useless and idle gesture. The law does not require him to resort to useless and idle gestures. *Levers* v. *Anderson,* 326 U. S. 219; *Utley* v. *St. Petersburg,* 292 U. S. 106; *Kansas City S. Ry.* v. *Ogden Levee Dist.* (CCA-8) 15 F. 2d 637; *Gonzalez* v. *Williams,* 192 U. S. 1, 15.

The "denial of certiorari by this Court in the earlier case imported no expression of opinion on the merits. *House* v. *Mayo,* 324 U. S. 42, 48, and cases cited" (page 6 slip opinion, 67 S. Ct. 1588, 1592) is conceded to be applicable to the denial of certiorari by this Court in the *Flakowicz* and *Rinko* cases. While the denial of certiorari did not import an expression of opinion by this Court on the merits, it must be conceded that the bad climate that prevailed, as a result of the decisions of the inferior federal courts and the failure of this Court to grant certiorari, would not lead a reasonable person to believe that petitioner would have found a change in climate if he had applied for certiorari.

"Although denial of certiorari is not to be taken as expression of opinion in any case, it would be idle to claim that it has no actual or reasonable influence upon the practical judgment of lawyers whether appeal should be noted and taken upon the chance that in a case substantially identical this Court's discretion would be exercised, in the absence of conflict, in a contrary manner at the stage of application for certiorari." *Sunal* v. *Large,* note 9 of Mr. Justice Rutledge's dissenting opinion, page 5 of slip opinion, 67 S. Ct. 1588, 1598.

During the time in which petitioner had the right to apply for certiorari to review the judgment of the Sixth Circuit Court of Appeals in *Klopp* v. *United States* (148

F. 2d 659), there was not pending other cases similar to that of petitioner, either before this Court or any other court of appeals, involving a situation identical to the facts in petitioner's case. Therefore the tenuous argument of this Court in *Sunal* v. *Large* and *Alexander* v. *Kulick* that "The same chief counsel represented the" defendant in the present case "and those in the *Estep* and *Smith* cases" does not apply here (See slip opinion pages 6-7, 67 S. Ct. 1588, 1592)

The Court is not confronted with such disturbing question in this case, that loomed up in the open road before the Court in the *Sunal* and *Kulick* cases: "Why the legal strategy counseled taking appeals in the *Smith* and *Estep* cases and not in these we do not know." (Slip opinion page 7, 67 S. Ct. 1588, 1592)

"The same road was open to Sunal and Kulick as the one Smith and Estep took." (*Ibid.*) It should be remembered that petitioner Klopp took the same road that Flakowicz and Rinko took. Since the bridge was out, resulting in the road's being blocked to Grieme, Flakowicz and Rinko, petitioner had no grounds to believe that the road "was open to" him in this case. Petitioner "had pursued the appellate course and failed" and therefore his case should "be quite different." *Ibid.*

To sum up this matter, the Court is referred to its own opinion written by Mr. Justice Douglas and the dissenting opinion of Mr. Justice Rutledge in *Sunal* v. *Large*. 67 S. Ct. 1588, 1590, 1597. See also the opinion of Judge Hand in *Kulick* v. *Kennedy*, 157 F. 2d 811, 813, 814.

Petitioner exhausted his administrative remedies upon taking the preinduction physical examination and it was unnecessary for him to report at the civilian public service camp as ordered for the purpose of completing the selective process. Petitioner was ordered to report for work of national importance on March 9, 1944 (2, 185), six weeks before Dodez was ordered to report. (67 S. Ct. 301, 303)

In this case, on February 17, 1944, the armed forces, at the conclusion of the preinduction physical examination, *accepted* petitioner for general military service. (231) It is manifest that the acceptance upon a preinduction physical examination ends the selective process. Petitioner was ordered to report for work of national importance after an amendment of the Selective Training and Service Act, dated December 5, 1943, which provided for acceptance upon a preinduction physical examination before the order is issued. (50 U. S. C. App. § 304 (a))

"We hold therefore, in accordance with Dodez' view and the Government's concession, that he was not required to report to the camp, under the Regulations effective when his order to report became operative in order to complete the administrative process; and that he therefore was not foreclosed by the *Falbo* decision from making any defense open to him in his criminal trial under the statute or the Constitution aside from the effect of that decision. *Estep* v. *United States,* 327 U. S. 114; *Smith* v. *United States, ibid.;* cf. *Billings* v. *Truesdell,* 321 U. S. 542." *Dodez* v. *United States,* 67 S. Ct. 301, 307.[6]

As to the holding of the district court in these habeas corpus proceedings that the refusal to allow the defense to petitioner was harmless error because there was basis in fact for the classification given petitioner by the draft board, the holding of this Court in *Dodez* v. *United States* is applicable. In that case the Court said:

"In the *Estep* and *Smith* cases, after holding that the petitioners had been wrongfully denied opportunity to defend by attacking the validity of their classifications, this Court reversed the convictions and remanded the causes for new trials, stating: "We express no opinion on the merits of the defenses which were tendered. Since the

[6] Judge Lindley in these habeas corpus proceedings in the district court said that petitioner had not exhausted his administrative remedies. [69-72] In this respect the holding of Judge Lindley is a departure from the holding of this Court in Dodez v. United States, 67 S. Ct. 301.

petitioners were denied the opportunity to show that their local boards exceeded their jurisdiction, a new trial must be had in each case." 327 U. S. at 125. Dodez' situation is identical, in this respect, with those of Estep and Smith. Accordingly we remand the cause, as was done in the *Smith* and *Estep* cases, for further proceedings in the trial court, without expressing opinion upon those further issues." *Dodez* v. *United States,* 67 S. Ct. 301, 307.

Conclusion

It is submitted that the facts in this case are distinguishable from the facts in the cases of *Sunal* and *Kulick,* 67 S. Ct. 1588. In fact the dictum in the decision of the Court in those two cases supports the petition for the writ here.

In the event that the Court concludes, however, that this case is not distinguishable but is governed by the decision of the Court in the *Sunal* and *Kulick* cases, the Court is requested to postpone a determination of this petition until the joint petition for rehearing in the *Sunal* and *Kulick* cases—being filed simultaneously with this petition—is considered and determined.

For each and every one of the reasons stated in the petition, this supporting brief and in the petition for rehearing on the *Sunal* and *Kulick* cases, the petition for writ of certiorari should be regarded so that the errors committted by the courts below may be corrected.

Petitioner prays that the judgments rendered by the court of appeals and the district court against petitioner be reversed and petitioner discharged or, in the alternative, that the judgments be reversed and a new trial ordered.

Respectfully submitted,

HAYDEN C. COVINGTON
Counsel for Petitioner

APPENDIX

In the
UNITED STATES CIRCUIT COURT OF APPEALS
For the Seventh Circuit

No. 9135. October Term, 1946, April Session, 1947

WILLIAM THOMAS KLOPP,
Petitioner-Appellant,
vs.
J. OVERLADE, Warden,
Respondent-Appellee.

On Petition for Rehearing

July 3, 1947

Before KERNER and MINTON, *Circuit Judges,* and BRIGGLE, *District Judge.*

Per Curiam. Appellant's petition is directed to a reconsideration of the opinion of the court holding that no error was committed in denying the writ. While nothing substantial is presented that was not fully considered upon the original hearing, we purposely refrained from acting on appellant's petition until now, because the *Sunal* and *Kulick* cases, cited in our opinion, were pending in the Supreme Court.

In those cases, it too was claimed that the judgments and sentences under which the petitioners were confined were null and void because the convicting courts lacked jurisdiction by reason of the denial of petitioners' constitutional rights of due process consequent upon rejection of the evidence tendered. On June 23, 1947, both of these case were decided in one opinion, the Court holding that under the circumstances there appearing, habeas corpus could not be used as a substitute for a writ of error. In its

opinion the Court said: "The courts which tried the defendants had jurisdiction over their persons and over the offense. They [the courts] committed an error of law in excluding the defense which was tendered. That error did not go to the jurisdiction of the trial court" and continuing, "Error in ruling on the question of law did not infect the trial with lack of procedural due process."

We think that under the facts in our case, what was said in the *Sunal* and *Kulick* cases is especially applicable here, and the petition for rehearing must be denied. It is so ordered.